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ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND
RELATED MATTERS.

Hearing held
21st floor
180 Dundas Street West
Toronto, Ontario

The Honourable Mr. Justice S.G.M. Grange

Commissioner

P.S.A. Lamak, Q.C.

Counsel

E.A. Cronk

Associate Counsel

Thomas Millar

Administrator

Transcript of evidence
for

17 MAY 1984

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ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN
AND RELATED MATTERS.

Hearing held on the 21st Floor,
180 Dundas Street West, Toronto,
Ontario, on Thursday, the 17th
day of May, 1984.

THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner
THOMAS MILLAR - Administrator
MURRAY R. ELLIOT - Registrar

APPEARANCES:

P.S.A. LAMEK, Q.C.)	Commission Counsel
E. CRONK)	
D. HUNT)	Counsel for the Attorney
L. CECCHETTO)	General and Solicitor
		General of Ontario (Crown
		Attorneys and Coroner's
		Office)
I.G. SCOTT, Q.C.)	Counsel for The Hospital
I. J. ROLAND)	for Sick Children
M. THOMSON)	
R. BATTY)	
B. PERCIVAL, Q.C.)	Counsel for The
D. YOUNG)	Metropolitan Toronto Police
F. KITELY		Counsel for the Registered
		Nurses' Association of
		Ontario and 35 Registered
		Nurses at The Hospital
		for Sick Children

(Cont'd)



APPEARANCES (Continued)

D. BROWN	Counsel for Susan Nelles - Nurse
G.R. STRATHY)	Counsel for Phyllis Trayner -
P. RAE)	Nurse
C. THOMSON , QC)	
F. J. SHANAHAN	Counsel for Mr. & Mrs. Dominic Lombardo (parents of deceased child Stephanie Lombardo); and Heather Dawson (mother of deceased child Amber Dawson)
W.W. TOBIAS	Counsel for Mr. & Mrs. Hines (parents of deceased child Jordan Hines)
J. SHINEHOFT	Counsel for Lorie Pacsai and Kevin Garnet (parents of deceased child Kevin Pacsai)

VOLUME 147



EXHIBITS

Exhibit No.	Description	Page
419	Affidavit of Mr. & Mrs. L. Gosselin dated May 14th, 1984.	3686



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May 17/84
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---(Upon commencing at 10:00 a.m.)

THE COMMISSIONER: Mr. Labow.

MR. LABOW: Mr. Commissioner,
before you make your statement, I have given
the Registrar a copy of an affidavit from Lise
and Lucien Gosselin, the parents of Real Gosselin,
which I would like to make an Exhibit at the
Commission. It is a very simple affidavit from
the parents, setting out their recollection of
the events leading up to their son's transfer
to the Hospital for Sick Children, the transfer,
itself, and the situation during his short stay
at the hospital and, in addition, it is their
perceptions of their son's condition and their
recollection of the events surrounding his death.

After some discussion with Counsel
for the Hospital we are still waiting to talk
to the two doctors who are mentioned in the
affidavit from Winnipeg, who I have yet to get
ahold of and the doctor, who admitted this child
to the hospital, who is on vacation, and subject
to talking to them, and possibly calling any one
of them, as a witness to explain the situation as
they understand it, I would like this affidavit



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2 entered.

3 MR. ROLAND: Mr. Commissioner,
4 we have agreed that the affidavit be put in
5 on the basis that we accept it, as the recollection
6 and the account of Mr. and Mrs. Gosselin. We
7 don't agree at this stage, at least to the facts
8 set out therein, to the extent that they recount
9 conversations with doctors and information obtained
10 from doctors, including doctors for the Hospital
11 for Sick Children. We haven't been able to locate
12 or at least to speak to the doctors that are referred
13 to and we are attempting to do that, so we are
14 quite prepared to have the affidavit entered as
15 an account of the Gosselin's recollection of the
16 events, but not for the truth of the facts set out,
17 until we have had a chance to speak to the doctors
18 referred to, because you will see that the account
19 set out in the affidavit is a recollection of
20 what doctors had said.

21 THE COMMISSIONER: Yes, all right.
22 Does anyone else have any comments on this?
23 Has this affidavit been distributed?

24 MR. LABOW: I do have copies.

25 MR. STRATHY: I wonder, for those



1
2 of us who have not seen the affidavit whether
3 we could have an opportunity to read it and then
4 advise you whether we have any objection to it
5 being filed as an Exhibit.

6 THE COMMISSIONER: Perhaps we
7 had better do that first. I think that after
8 I have made this statement we will rise for a
9 few minutes so that people can contemplate the
10 statement and the affidavit before we go on to
11 the question of argument on Phase I.

12 MR. LABOW: Thank you.

13 THE COMMISSIONER: We will just
14 hold that for a moment then. Anyone else have
15 anything preliminary?
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2 In this Commission I am required, "without
3 expressing any conclusion of law regarding civil or
4 criminal responsibility",
5 inter alia:

- 6 "3) to inquire into and report on
7 and make any recommendations
8 with respect to how and by what
9 means children who died in Cardiac
10 Wards 4A and 4B at the Hospital
11 for Sick Children between July 1st
12 1980 and March 31st, 1981, came to
13 their deaths;
- 14 4) to inquire into, determine and
15 report on the circumstances
16 surrounding the investigation,
17 institution, and prosecution of
18 charges arising out of the deaths
19 of the above mentioned four infants:"

20 When the hearings began, we decided for
21 convenience to deal with the subject matter of
22 enumerated paragraph 3 first and that in enumerated
23 paragraph 4 last and entitled them Phase I and II
24 respectively. In the course of Phase I a question
25 arose as to whether I was entitled in my Report to
name any person I might find to have administered to
any child a toxic dose of digoxin. I held that I was
so entitled but a case was stated and eventually the
matter reached the Court of Appeal which held that I
was not. The reasons of the Court of Appeal in so
holding are attached as Appendix A. The problem now
arises as to the effect of that judgment on Phase II



1 and I have expressed the question thus:

2 "Can I, in the light of the recent
3 decision of the Court of Appeal,
4 receive evidence or submissions or
5 report on the propriety or otherwise of
6 the conduct of any person in the course
7 of the investigation and prosecution".

8 I think it clear that the words of
9 paragraph enumerated 4 standing by themselves would
10 indicate the answer "Yes" but the difficulty comes
11 from the limitation "without expressing any conclusion
12 of law regarding civil or criminal responsibility" and
13 the effect given to those words by the Court of Appeal.
14 At pages 14 - 15 of its judgment the Court said "But
15 the Order-in-Council specifically limits the Commissioner
16 by forbidding him to express any conclusion of law
17 regarding civil or criminal responsibility (for a
18 death or the deaths). In our opinion, such a conclusion
19 may be expressed by findings of fact which without more,
20 when found against a named person, constitute a con-
21 clusion of criminal or civil responsibility." The Court
22 goes on to say in effect that I may find a child died
23 from the administration of a toxic dose of digoxin and
24 may determine whether the dose was administered
25 deliberately or accidentally but may not name the
administrator because to do that would constitute a finding
either of civil (in the case of negligence) or criminal
(in the case of design) responsibility.

Susan Nelles has brought action against
the Attorney General and the Metropolitan Toronto



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1 Police by Writ and Statement of Claim issued before the
2 promulgation of the Order-in-Council founding her
3 action in negligence, in malicious prosecution and in
4 false imprisonment. The action against the Attorney
5 General has been dismissed as disclosing no cause
6 of action but that is under appeal; the action against
7 the police has not been attacked in summary proceedings.
8 It is not for me to say whether an action in negligence
9 without more will lie. It has been pleaded and the
litigation is pending.

10 The substance of Miss Nelles' claim
11 is that the police proceeded to charge her precipitately
12 and without a full and proper investigation. It seems
13 to me that that is the main issue also in paragraph
14 4 - Phase II - at least as I originally contemplated
15 it. If I were to make such a finding - or for that
16 matter to say the opposite - it would, in the words of
17 the Court of Appeal, "constitute a conclusion of (criminal
18 or) civil responsibility." The same thing of course
19 applies to a finding of malice. Whereas any finding
20 of murder or negligence in Phase I would not involve
21 criminal or civil responsibility until the administrator
22 was named, the same cannot be said for Phase II. To
23 comment upon the conduct of any crown attorney or any
24 policeman would be a comment upon the potential liability
25 of the Attorney General and the Metropolitan Police



Chief , who are defendants in the Nelles action.

Mr. Sopinka has argued that the Court of Appeal decision in Phase I is based upon constitutional considerations and the protection of persons from coercive criminal proceedings whereas Phase II is an inquiry into the administration of justice and no constitutional bar exists. I cannot accept the distinction. The Court did make reference to constitutional impediments that might have arisen but squarely based its decision on the restriction as to findings of civil or criminal responsibility. That restriction applies as clearly and as much to Phase II as to Phase I. It is perhaps also interesting to note that the Attorney General in his statement in the Legislature upon the introduction of the Order-in-Council made reference to the pending civil proceedings (see page 7 - 8 of the attached judgment of the Court of Appeal) and assured the Legislature that the restriction would apply to those proceedings as well as to any criminal proceedings. And the Court of Appeal put it this way at page 17: "In our opinion the specific limitation imposed on the Commission by the Order-in-Council in the circumstances was imposed out of concern for those persons who might become involved in other proceedings or be called upon to stand their



trial."

I am therefore of the opinion that the Order-in-Council as interpreted by the Court of Appeal, does not permit me in my report to make any comment adverse or favourable on the conduct of any party involved in the investigation or prosecution because such comment, certainly if it indicated negligence or malice or the lack of it, would be a conclusion of civil responsibility or the lack of it. As the Court of Appeal says, dealing with Phase I (see page 16), the fact that my findings are not binding in future proceedings is not determinative; the finding is enough to breach the injunction.

There remain two further problems. The first relates to the evidence. I think it is fundamental that I should not - and indeed cannot - receive evidence that will not be relevant to any issue I can report upon. I also believe it would be very unfair to receive any evidence that might conceivably reflect upon a person's conduct when I had no power to exonerate him. In Phase I, we received evidence relating to identity both before and after the decision of the Court of Appeal. The justification for receiving it afterwards was that it was related to the cause of death, an issue which was



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2 clearly left for me to determine. In Phase II there
3 is only the one issue, namely the circumstances of the
4 investigation and prosecution and those circumstances
5 do not, if I rightly interpret the Court of Appeal
6 Judgment, include negligence or malice on the part
7 of the persons involved.

8 Mr. Hunt has argued that I can proceed
9 with Phase II drawing the fine line with each question
10 as to whether its purpose is solely to demonstrate
11 civil responsibility, or is directed solely or
12 partially to the circumstances of the event. I can
13 only say the task would be immensely difficult and it
14 would probably be beyond my power to make rational and
15 consistent rulings.

16 In any event, any opportunity I might
17 have to tread this delicate line has been foreclosed.
18 Mr. Percival has made it quite plain (as he is entitled
19 to do) that on the first question that is put to any
20 of his clients that tends to show why they did or did
21 not do something, he will object and if I do not sustain
22 his objection, he will ask for a stated case and
23 proceed to the courts.

24 And that brings me to the final area of
25 concern, namely what do we do from now on. One
solution is to state a case for consideration by the



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2 Divisional Court and any other Court to which it may
3 be taken. The course even with the greatest cooperation
4 (which we enjoyed in the previous instance) will take
5 many months and pending the final decision, as I have
6 said, I do not think it is practicable (and once a
7 case is stated it may indeed be illegal) to proceed
8 with the evidence in Phase II. A delay of that
9 nature can only undermine the whole Commission. I
10 can of course proceed to the preparation and delivery
11 of the Report in Phase I but presumably it was
12 anticipated that the whole report would be received and
13 made Public at the same time and in any event the two
14 phases are interrelated, Phase II depending in some
15 part upon the findings in Phase I and there should
16 not be a long pause between them. The route through
17 the Courts is not attractive.

18 There is another possible solution. The
19 decision I have reached is based, as it must be,
20 entirely upon legal principles. It may be that the
21 decision is not in accord with the intention of the
22 Lt. Governor-in-Council either at the time the Order-
23 in-Council was drafted or now. It may be, for instance,
24 that it was intended that I should be entitled to
25 comment fully on the conduct of persons involved in
the investigation and prosecution or it may be that it



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2 was intended to authorize certain limited (but
3 clearly defined) comment. If that is so and if the
4 intention remains, it can be realized by an amendment
5 to the Terms of Reference which, if carefully drafted,
6 would circumvent any further litigation.

7 I have accordingly caused to be
8 delivered to the Attorney General a letter in the
9 following form.

10 Dear Mr. Attorney:

11 I enclose a copy of a statement I
12 intend to make at the Hearings. You will note that I
13 have decided that in light of the recent Court of
14 Appeal Judgment, I cannot, in my report on the
15 subject matter of paragraph enumerated 4 of the Order-
16 in-Council establishing the Commission, comment upon
17 the conduct of any persons involved in the investigation
18 or prosecution. You will also note that I do not
19 intend to permit evidence to be tendered nor witnesses
20 to be examined, where the purpose appears designed to
21 reflect upon such conduct. You will see also that I
22 anticipate lengthy litigation to determine whether
23 the decision is in accordance with law and that I do
24 not intend to proceed with Phase II until the matter
25 is resolved.

If the decision I have felt constrained



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to reach is not in accord with the intention of the
Lt. Governor-in-Council, perhaps you might consider
recommending an amendment to enumerated paragraph 4
to make that intention clear. That course would not
only ensure that the intent is carried out but
would also circumvent the long delay of the litigious
process.

It is a political and not a judicial
question so I make no recommendation. The interests
represented before me are so diverse that there is
no possibility of making any decision that will be
universally satisfactory. I say only that if I am
to proceed to Phase II under the restrictions as I now
see them, I do not know what public interest will be
served and I doubt that I can produce a valuable Report.

Yours very truly,

As I indicated before, I think we will rise now for
about 10 minutes and then if you have any comments
that you want to make on this statement that is fine.
If you have any comments that you want to make on
the affidavit filed by Mr. Labow I will hear them
and after that is done we will proceed to the
question of argument in Phase I.

--- Short Recess.



1
2 --- on resuming.

3 THE COMMISSIONER: When I asked for
4 comments on the statement, I didn't mean favourable
5 or unfavourable; I meant anything arising out of it.

6 Has anybody got any questions on that?

7 MR. TOBIAS: I have one question. The
8 inference, as I read it -- I just wanted to get some
9 clarification. I take it, from the tone of the statement,
10 that you will not be calling for people to argue
standing in Phase II to hear some reply?

11 THE COMMISSIONER: I thought we could
12 proceed if everybody assumed the most favourable
13 position for standing, but I was persuaded out of that
yesterday.

14 MR. TOBIAS: Thank you, sir.

15 THE COMMISSIONER: So I won't call for
16 it but, when we finally know what is available in
17 Phase II, then I'll have to call for it.

18 Yes, Miss Kitley.

19 MS. KITLEY: Mr. Commissioner, you have
20 indicated in your comments that you have caused the
21 letter to be delivered. Can I ask when? And the
22 second question is, if you have any idea when you
are going to have a response?

23 THE COMMISSIONER: The answer to the
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first question is, I think Tuesday afternoon.

Is it Tuesday afternoon?

MR. HUNT: Yes.

THE COMMISSIONER: I also asked Mr. Hunt to ask his boss not to publish it until I have had a chance -- but I believe, that when one writes letters to people, that one should let them see it before the rest of the world sees it. That's an old-fashioned view, I know, but it is the one I have, and I have persisted in it.

MS. KITELY: You don't have any time --

THE COMMISSIONER: I think he has it but I don't imagine he has made any decision on it, but perhaps he has.

MS. KITELY: Do you have any expectation of when there might be a resolution?

THE COMMISSIONER: No.

MS. KITELY: Thank you, sir.

THE COMMISSIONER: Anything else?

All right now, let's deal with the Gosselin affidavit. Yes?

MS. CHOWN: Mr. Commissioner, I feel I must rise, as Mr. Roland did. I've reviewed the affidavit and doctors at The Hospital for Sick



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2 Children are mentioned in paragraphs 12, 13, 14, 19 and
3 20 - they are not named, and I understand from Mr.
4 Labow that is because the Gosselins simply cannot put
5 a name to the doctors they talked to. I do have
6 concerns that, through those paragraphs, statements -
7 through the Gosselins - are being made about information
8 they received about what action the Hospital was going
9 to take, that the doctors were going to take concerning
surgery, the condition, and so on.

10 Again, as Mr. Roland indicated, if the
11 affidavit is going in simply to say this is the way
12 the Gosselins recall it - obviously, I can't have a
13 concern with that. I am not sure these unnamed doctors
14 are my clients or not. I simply rise because some of
15 them may be, but I think we will be making attempts to
16 see if we can identify them and to see if there is
17 perhaps further or additional information on these points
raised by them.

18 THE COMMISSIONER: Yes, all right.
19 I take it you are not objecting to it being filed?

20 MS. CHOWN: No, I don't, as Mr. Roland
21 said in a limited sense of it being their recollection.

22 THE COMMISSIONER: Any comments,
23 anyone else?

24 MR. BROWN: I take a similar position.
25 There is one or two references to Miss Nelles in
paragraph 18. The references are, perhaps, not very



1
2 important; simply that she came into the room and
3 later advised the parents of the death of the child.

4 I do not object to the affidavit
5 going in; however, I do not accept that is the truth of
6 the contents and I would like an opportunity to
7 confirm that with my client.

8 THE COMMISSIONER: All right. Miss Kitley?

9 MS. KITELY: I note in paragraph 16
10 there is reference to Nurse Nelles and another nurse.
11 Since that nurse is not identified, it is hard to tell
12 whether we act for her or not, and I would, there-
13 fore, reserve -- take the same position as my friends;
14 namely, that it can go in for the purpose only
15 put forward.

16 THE COMMISSIONER: Yes, all right. Mr. Labow?

17 MR. LABOW: I just want to make a
18 few points clear.

19 First of all, I have been trying - and
20 had some help from many of my friends here - to talk
21 to the doctors who allegedly took care of this child
22 in the Hospital and had an opportunity to talk to at
23 least one. I would like to talk to them at length
24 and find out if this is an accurate recollection of
25 exactly what went on; if their perceptions were
correct.



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With regard to Nurse Nelles, I asked her specifically when she was in the stand if she did go to speak to them and if she went in with a doctor, and she did not recall.

No other nurse that I questioned had any recollection of doing the same.

So, my friends' thoughts about what they feel are on the record, but I don't see how we are going to be able to find out anything more regarding the nurses, and I do hope to find out something more regarding the doctors.

THE COMMISSIONER: Well, I guess all we can do is give it a number and we will wait to see what happens. It may be necessary to have further evidence. We can have that on June 4th, whenever we want it, if it's necessary, and we can have it.

--- EXHIBIT NO. 419: Affidavit of Mr. & Mrs. L. Gosselin, dated 14 May, 1984.



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2 THE COMMISSIONER: I will ask everybody,
3 before insisting upon having further evidence, to
4 give some concern as to whether the contents of
5 this affidavit really do bear, or how greatly they
6 bear upon the cause of death.

7 All right? Now, anything else before
8 we proceed? Yes, Mr. Tobias.

9 MR. TOBIAS: Perhaps I am pre-emptying
10 Mr. Lamek and if I am I apologize for it. Mr. Lamek
11 and I had a telephone conversation with Dr. Derek
12 DeSa last Friday and I understand, as a result of
13 that telephone conversation, Mr. Lamek is now in
14 possession of a further supplementary report, a
15 copy of which I will be showing you later today. I would
16 just like to ask what his present contention is as
17 to when that will be introduced, as an exhibit and
18 when copies will be made available to other counsel?

19 MR. LAMEK: Mr. Commissioner, Mr.
20 Tobias is quite right that I have received a letter
21 from Dr. DeSa. I have not yet provided it to Mr.
22 Tobias. I had copies made this morning and I expect
23 to distribute it to everybody.

24 Mr. Tobias' comments are of particular
25 interest, of course, but so will everybody else's
be. Maybe I can solicit the views of people before



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reconvene into argument and if there is no objection to it being received I can tender it at that time. If there is objection to its being received then I suppose we will have to hear them and maybe again on June the 4th.

THE COMMISSIONER: All right.

MR. LAMEK: It is a clarification of one paragraph in the DeSa Report relating to the Hines child.

THE COMMISSIONER: All right. I take it that will be up to everyone within the next 24 hours?

MR. LAMEK: Yes.

THE COMMISSIONER: Thank you. Does that solve your problem?

MR. TOBIAS: Yes, thank you.

THE COMMISSIONER: Anything else?



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MR. LAMEK: One other thing if I may, Mr. Commissioner. It has been brought to my attention that the Toronto Sun of this morning has an editorial referring to the accommodation, which has been provided to the press in these, I mean, quarters and I have a copy of that editorial for you, sir. It would be of help to you.

Let me be clear, I take no pleasure in battling the press on these matters. I am really not engaged in a protest of Sun bashing, but there are comments in this editorial which reflect upon a member of the Commission staff and perhaps inferentially, too, upon the cooperation of the Ontario Municipal Board Mr. Chairman. I feel obliged to say something about it and I don't know whether everyone here has seen this editorial, sir? Perhaps I could read it and comment, as I go.

It is headed Bad Style, which I take it is intended to refer to the subject matter of the editorial, rather than to the writing of the editorial.

It reads:



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" The Grange commission goes on.
Reputations are smeared,
accusatory questions are asked.

A lot of people are blaming the
press for the mischief of the
Grange commission, which is like
cutting off the head of the
messenger who brings bad news.

It's evident that the real
problem of the inquiry into the
deaths at the Hospital for Sick
Children is not with the press
reporting it or the judge heading
it. The only way to establish
whether babies were murdered is
through proper trial process,
not with this inquiry.

If the press were not there,
the precedent would be set for
closed-door, press-release,
publicly-funded Star Chambers --
which may be what our regulators
and legislators would like, but
they don't make for a free and



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decent society. "

I pause there. Regulators and legislators may speak for themselves. Sir, it has been a basic principle which we have followed from day one in this Commission, that all hearings to receive evidence have been held in public. It was your initial decision that these proceedings should be as public as possible and that as complete access as possible should be extended to the press, both print and electronic news media. It cannot reasonably be said, I believe, that this commission has sought to exclude the press or to make their lives difficult. I trust that we have been open and cooperative with them. They, I believe, have been open and cooperative with us.

The editorial goes on:

" In a recent attack of pettiness, one of the Grange commission bureaucrats decided to put the press in their place. Which, as far as administrator Thomas Millar is concerned, is at the back of the room, behind spectators,



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next to the drone of the air
conditioner, without a press
table, notebooks on knees
and behinds on hard chairs. "

Let's be plain about this, Mr. Commissioner.

You have said that the chairman of the Ontario
Municipal Board was generous, indeed, in extending
to us the use of his large hearing room.



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We knew from the beginning that we were not on a long term lease and he was generous and extended it on a couple of occasions so that we could get as close to the end of Phase I, as possible, before we have to move. We all knew that when we moved we would be into less spacious accommodation. Indeed, it looked at first as though the only people, who could be fitted into this room, were the necessary acolytes, if you will, the Registrar and the Court Reporters and the myriad counsel we have here and there might not be room for anybody else, public or press, and they would have to be accommodated in the overflow room.

Representatives of the news media came to me about that and told me that it would be difficult for them to do their job satisfactorily if they could not be in the same room and in the result, efforts were made to accommodate them. That took a good deal of shuffling and if the members of the press think their accommodation is a little cramped then they should try sitting at some of these counsel tables, which are not as precisely comfortable.

We have done our best to accommodate them, sir, and in the result there is not lavish



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2 space or not very comfortable space, but space in
3 this room that has been provided. It is the
4 best that we can do. I am sorry it can't be better.
5 The seats are no harder than they were in the OMB
6 room and they are no more lacking of press table
7 than they were in the OMB room, and with the utmost
8 respect to the author of the Sun's Editorial, the
9 attack is just a little unfair, particularly, upon
10 Mr. Millar, to suggest that he has embarked upon
11 some scheme to exclude the press or to make life
difficult for them is grossly unfair.

12 I guess, as senior member of the
13 Commission staff, I feel absolutely obliged to
14 come to his defense and say that is gross and I
15 reject the imputation contained in the editorial .
It goes on later:

16 "The Grange Commission has been
17 evicted from its more spacious OMB
18 hearing room, and now is packed into
19 a tiny room."

20 I referred to that. There is no possible reflection
21 in any way upon the generosity and the co-operation
22 of the Municipal Board in this manner.

23 "A second one is used for overflow
24 press and spectators who can watch the
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F-3

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proceedings on the used bedroom TV

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set of a Rogers cable system employee."

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One wonders about the observation of pettiness
earlier in this editorial when one reads that.

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THE COMMISSIONER: How did they know
it was a bedroom set?

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MR. LAMEK: We may have to ask that.

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"Torontonians want to know what the
commission is up to. It may be that

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Millar doesn't want them to know or

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wants to separate the press from the

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professionals -- the judge, lawyers,

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police, bureaucrat and even witnesses

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who all form a sort of cosy club that

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has evolved over the past year of the
hearing.

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This is not the style associated with

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Mr. Justice Samuel Grange and maybe

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he'll want to see that Administrator

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Millar ceases and desists from making

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it his style."

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Mr. Commissioner, I don't think I need to say any more
about the matter. He is unfair to Mr. Millar who

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is doing his best to provide accommodation for

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everybody in a very difficult situation. I only

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regret that somebody thought it appropriate to write such an editorial.

THE COMMISSIONER: I can only echo what you have said, reading this. I have often thought that some of the things that have been said about the Commission and Commissioner were unfair, but it is fair game. I don't think it is fair game to go after the Administrator. I take responsibility for everything that has happened and if something was not appreciated I think they should-- they're going to have to go after me and we have enough trouble.

I also want to say something about the OMB. The Municipal Board has been extremely good to us and anytime anybody suggests they have thrown us out, that is most unfair too. They don't have perhaps quite the audience that we have and the Chairman can't stand up in his defense. I want to say that I made promises to them about five times and they weren't deliberate lies, but I did really honestly think that we would be out of there within a year and I honestly thought, too, that Phase II, and it did turn out that I was quite right on that, would not be nearly as popular as Phase I, and we wouldn't have the other people here, so I made all



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2 of those and, of course, the OMB has made its own
3 arrangements and those of us who are upstairs knew
4 that there were several instances where the OMB
5 didn't have the accommodation that they would have
6 liked to have had. They never once made me live
7 up to my promise that I would close down. I promised
8 them that I would close down the hearings for a
9 day or two if they had something, as they did
10 have on the Group Homes, but they didn't hold me
11 to it. We were able to continue the hearings, so
12 I think it is most unfair and I am not saying that
13 this editorial really comes right out with it, but I
14 think the casual mention of eviction, and that sort
15 of thing that reflects upon the OMB and if I ever
16 want to get another favour from them they may not
17 be so keen and I wouldn't blame them.

18 As far as Mr. Millar is concerned,
19 I repeat again, that he, like the rest of us, try to
20 do the best we can. If he, in any way, fails, I
21 think it is only fair for the media to blame me or
22 perhaps, better still, Mr. Lamak, but not, please
23 don't blame Mr. Mill r because he is only trying to
24 do the best he can just like the rest of us.

25 All right, with that interlude, can
we get on to Phase I?



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THE COMMISSIONER: Does anybody have any complaints about the general routine, namely starting with the commission Counsel, proceeding in the order in which we have done it, subject to anyone making an exchange, if they want to, right down to Mr. Shinehoft at the end and coming back -- I'm sorry, I didn't mean that -- back, across, or whatever way you want to put the line, back to Mr. Lamek at the end. The reply will be only to what has been said by the Counsel who will follow.

Has anyone any complaint about that? Yes?

MR. BROWN: I have no complaints with the up and down system, or down and up system. I make one suggestion that there be a minor variation in the order, that is after commission Counsel has presented their argument, that Counsel for the Hospital for Sick Children present their argument.

As I indicated to you before, I think they have an interest in the deaths of all of the children. They would have more than us the facilities and resources to review the



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2 evidence and I think it might be more expedient
3 that they be put in second and, as I indicated
4 to you earlier, sir, it might well cut down
5 on the length of our argument.

6 THE COMMISSIONER: Yes. The
7 only thing, I think we have been through this
8 before, I think Mr. Roland or Mr. Scott, somebody
9 said they would probably like to pause. You
10 may find that you don't need that pause; I don't
11 know. There may well be.

12 I suspect commission Counsel will
13 take the first week. I may be wrong and in which
14 case we could perhaps adjourn and then you will
15 get whatever time you need, as long as it is
16 not more than --

17 MR. SCOTT: Two or three days.

18 THE COMMISSIONER: Do you count
19 the weekends as two days?

20 MR. SCOTT: We made all that clear
21 months ago. Miss Thomson tells me why she
22 requires it and I can't imagine it, but she would
23 require about two days at least, if Mr. Lamak
24 takes a week. If he is shorter than that I offer
25 that as an inducement that we might not require



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quite as much time.

THE COMMISSIONER: I'll try to reduce it, but I am thinking of the fact that surely you can, as he goes along --

MR. SCOTT: Yes.

THE COMMISSIONER: -- a lot of things will be resolved.

Well, can I put it this way, that I will allow you at least two days. If those two days happen to be a weekend you will have at least one extra day. Is that all right?

MR. SCOTT: Yes.

THE COMMISSIONER: The order will then change that the hospital will come second and you will be second last as well. Anyone else who wants to make a change can make the change and we will sort it out. As I said before, I don't mind anyone having two, or even three or four Counsel, for that matter, as long as each Counsel deals with a different subject matter, not the same thing over again, please.

I expect commission Counsel will provide their submissions between them and I have no objection to anyone else doing that, as well.



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Yes, Miss Kately.

MS. KATELY: Just a logistical matter, sir. Is it your plan to sit on Friday of the two weeks that are aimed for argument?

THE COMMISSIONER: It wasn't my plan.

MS. KATELY: Still on four day weeks then?

THE COMMISSIONER: I think so. I think that is right. It depends upon -- I don't mind sitting on Friday if that is the only day somebody is available, but ordinarily we show Monday to Thursday and we can decide that on the following Monday.

Anything else on that? Mr. Hunt, you have something that you wanted to say?

MR. HUNT: Yes, Mr. Commissioner. Perhaps I will just outline again the submission that I made last week when we were involved with an in-camera session and elaborate on it somewhat. Some of my friends weren't there.

My concern, and I raise it as a suggestion for your consideration, is with respect to the argument that is going to be presented to



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2 you on the question of identity. The situation,
3 as I see it, that we are in at the moment, is
4 that the Court of Appeal has clearly said in
5 your report that you cannot identify anyone that
6 you may conclude on the evidence was the
7 administrator of any overdose of digoxin that
8 killed the baby. Notwithstanding that, we have
9 received evidence, as pointed out this morning
10 both before and after the objection of the Court
11 of Appeal on the question of identity, because it
12 plays a limited role in the question of how and
13 by what means the children met their death. That
14 is, I would think, it helps to or may help to
15 characterize some of the deaths, as between natural
16 causes, accidents or foul play.

15 Now, that means that identity, the
16 issue of identity really plays a supporting role
17 in your main function on Phase I, which is to
18 determine how and by what means the children
19 caused their death.
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THE COMMISSIONER: That raises a very serious problem. I hadn't intended to meet that until we had the argument. The problem is how can I consider the question of identity in reaching the conclusion of the cause of death without, in effect, breaching the injunction in the Court of Appeal.

MR. HUNT: The Court of Appeals injunction deals with your final report. It doesn't prevent you from considering.

THE COMMISSIONER: All that I am talking about is that I consider all the evidence, but then what do I say in the report?

MR. HUNT: That is a problem really that I appreciate you are in a great deal of difficulty there and I presume it is because of the Court of Appeal had such confidence in your ability to sort that out that they left it to you.

THE COMMISSIONER: They overdid it.

MR. HUNT: The line that you will have to draw in dealing with that issue in your report is one of the fine ones that has been variously described as difficult, if not impossible, and perhaps it might be easier to consider that issue after we have heard the arguments on it and precisely



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what the positions are. It may not be any easier
then; I don't know.

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The issue that I am really concerned
with at this point is how to deal with the
argument on that, because if it does play only a
supporting role between the main function you have to
perform on Phase I then there is a danger, in my
submission, that the argument on that issue may
become, may be characterised by the public, as
something that has much more significance in a
supporting role than it really can play.

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There are a number of counsel here who
have a duty to their clients to argue that issue
totally before you on the question of how and by
what means the children caused their death and we
have seen over the past months what the public
perception of the Commission's function, insofar
as getting that evidence, was concerned.

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I don't direct any criticism at our
friends in the media. It is certainly their duty
to report the evidence, as it is elicited and the
questions that are asked in the course of eliciting it
and I submit that it is your duty to report, as well,
the submissions made by counsel. The danger is that
the submissions that counsel may make on that issue



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2 may be required to make, in order to discharge their
3 obligation to the client, may go much farther than
4 any of the questions that were asked of any of the
5 witnesses, because counsel will be required to
6 pull together the various pieces of evidence taken
7 over a number of months and put them into a
8 comprehensible package, in order to present them
9 to you.

10 In my submission, there is a danger
11 of the mere fact that a submission is made to you
12 on the question of identity, referring, as it must,
13 to the various pieces of evidence that will take on an
14 importance and significance in the public's
15 mind, that goes far beyond the role that it may play
16 in your ultimate decision and, in my submission,
17 there is a very great danger of reputations being
18 damaged in a far greater way by the submission that
19 may be made on that limited issue, then arose during
20 the course of any evidence that was given before
21 you.

22 Faced with that, if I am right in that
23 characterization of it, I submit you have a balancing
24 act to perform in dealing with the submissions of
25 counsel in the context of an open and public inquiry,
and realizing the role that that issue, and the



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2 submissions on that issue can play in your ultimate
3 report, you have to balance that against the interests
4 of the individuals who can potentially be damaged
5 by the submissions that will, of necessity, have to
6 be made by counsel, in order to represent your
7 clients.
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My suggestion to you for consideration to handle that is to hear from Counsel, all Counsel, on the question, the limited question of identity and how it factors into the question of how and by what means the children met their death during an in-camera session. All of the rest of the arguments, in my submission, should be held in public and any need during the public arguments to refer to arguments made in-camera can be dealt with, if, as and when, it arises at the time, and I stress --

THE COMMISSIONER: It would be awfully difficult for Counsel, as well as for me, wouldn't it? Wouldn't it be awfully difficult on the public part not to make reference to something I may have said in the in-camera session?

MR. HUNT: It might be difficult but it is certainly not impossible, knowing at the outset that that is the way the matter would be dealt with, and I think Counsel can prepare themselves to present their argument in both forms, in such a way as to minimize the need and difficulty in referring to what may have been said in-camera. It is difficult, I agree, but



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I certainly wouldn't consider that, from my point of view, impossible.

I make this submission to you, as a suggestion, that certainly it is your decision, procedurally, how to handle this and I submit that this is one way in which a very serious problem and very serious danger that poses difficulties, not just for the individuals concerned, but also for the commission and the public perception of the commission's function to be handled, balancing all of the interests and arriving at a satisfactory solution, which I concede may be difficult, but certainly not impossible, and viewed against the other prospect, in my submission, is preferable.

THE COMMISSIONER: Thank you. Do you want to go first?

MR. THOMSON: I think that perhaps it would be appropriate if I could say something now, both in response to what Mr. Hunt has said, and in response, Mr. Chairman, to a much broader issue that I think you have to address.

Before the argument begins, I ask you to make a finding , as to whether it is appropriate



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2 in argument at all, in public or in-camera, to
3 allow Counsel to make and develop submissions
4 that suggest that any individual may have
5 deliberately injected digoxin into any baby.

6 THE COMMISSIONER: You know,
7 Mr. Thomson, that telling Counsel what they can
8 or cannot say is one of the greatest departures from
9 our system that I can think of, and to say
10 you cannot argue that, the only basis for not
11 arguing is that it has no relevance. Mr. Hunt
seems to think it has some relevance.

12 MR. THOMSON: Let me put this
13 to you: first, it is important to remember that
14 the ground rules of this Commission changed dramatically
15 as we came to the very end. I mean by that, sir,
16 the decision of the Court of Appeal that said you
17 were wrong, in your view, that you could name
18 someone whom you found might have injected digoxin
19 in an unauthorized way. That is very important,
20 because up until the decision of the Court of
21 Appeal, for instance, the Atlanta Report was admitted
22 without objection. All kinds of questions were
23 put and all kinds of evidence. Now, what the
24 Court of Appeal has essentially decided, in my
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2 submission, is that you may not name someone
3 who may have been responsible for one of these
4 deaths, due to digoxin overdose if you find one,
5 and, secondly, it is implicit in what the Court
6 of Appeal has said, strongly implicit, that
7 you must not make findings that lead inevitably
8 to that conclusion. That is the line that I
9 want to address this morning, because what I was
10 saying, sir, really comes out of something that
11 appears at page 4 of the decision that you rendered
12 this morning.

13 I didn't rise with respect to
14 the discussion on Phase II, because I think the
15 issue is more importantly dealt with here.
16 This is an argument, sir, that I raised just before
17 my client was about to give evidence, the
18 discussion.

19 I want to read out loud the
20 bottom paragraph:

21 " There remainstwo further
22 problems. The first relates to
23 the evidence. I think it
24 is fundamental that I
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2 should not - and indeed cannot -
3 receive evidence that will not
4 be relevant to any issue I can
5 report upon. I also believe it
6 would be very unfair to receive
7 any evidence that might conceivably
8 reflect upon a person's conduct
9 when I had no power to exonerate
him. "

10 If I take that to be so and I take that statement
11 to have application in count I, in Phase I, how
12 much more unfair is it to allow Counsel for the
13 Attorney-General, Counsel for the Police Force,
14 to stand up in public and, in effect, make allegations
15 that amount to allegations of Murder, because that
is what the identity issue is all about.

16 THE COMMISSIONER: They want
17 to make them in private. That is what Mr. Hunt
18 has been asking for.

19 MR. THOMSON: That is what Mr. Hunt
20 is asking for. Can I tell you where I am going?
21 I am saying that they should not be allowed to
22 make them at all for reasons that I am attempting
23 to develop, sir. They should not be allowed to
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2 make them at all in public or in private and,
3 secondly, in the alternative, if they are allowed
4 to make such allegations, they ought to be
5 required to make them in-camera, in private,
6 essentially for the reasons that we have been
7 discussing here.

8 You see, there is a practical
9 problem here that we might as well face right
10 up to. If you are going to make findings exonerating,
11 let me say the doctors, the hospital, the, "the, the,
12 the" and by the end of it it points a finger,
13 then with respect, that will be terribly unfair
14 and that is what troubled me when I dealt with
15 this question of exoneration earlier on in my
16 argument, because what we end up doing is by
17 implication, like my client continues to be on
18 trial.

19 THE COMMISSIONER: I don't want
20 to pre-judge this issue. I think it is going
21 to come up. I am with you so far on that. I
22 am with you certainly that we can't exonerate
23 anyone if I can't condemn anyone.

24 MR. THOMSON: And let me say that
25 I don't want you to pre-judge, and I know you won't,



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2 sir, but I am asking you, with respect, to
3 judge this issue before anyone argues, because
4 otherwise there is no point in the judgement,
5 because I adopt what you said here that it is
6 fundamental, and if, as you said in your reasons,
7 that:

8 " It is fundamental that (you)
9 should not - and indeed cannot -
10 receive evidence that will not
11 be relevant to any issue I can
12 report upon. "

13 It, in my submission, equally follows that you
14 should not allow people to be making arguments,
15 either publicly or privately, on issues that
16 you cannot spell out and develop in your report.

17 THE COMMISSIONER: You see, what
18 I am trying to say here is that there is a
19 difference between Phase I and Phase II. That
20 is what I am faced with. If there is something
21 left in Phase I that I am required to find out
22 and report on how the children died, I have to
23 reach a conclusion. What Mr. Hunt said was that
24 the evidence of identity is maybe helpful in that
25 connection. If I accept his argument with which I



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2 may or may not accept it may or may not accept
3 it, if I accept his argument, surely I have
4 to let him put that argument. Do I not have
5 to let him put the argument? The problem is
6 do I do it in public or private? In private
7 it goes against the grain of everything I have
8 ever stood for.
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MR. THOMSON: I appreciate that, but you do have to balance the various interests. The Court of Appeal has said that. My friend has referred to it, a task, which comes at the extreme level is impossible and the Court of Appeal told you on what side you should weigh.

THE COMMISSIONER: But I think Mr. Scott persuaded me that what the Court of Appeal said there only applies to the report. I at first thought it did apply to the evidence, but then he said: "Where such an impasse arises it should be resolved, in our opinion...", that is at page 19. "...by a course best protects the civil rights of the persons the limitation was designed to protect." Certainly the limitation is without expressing any conclusion of law regarding civil or criminal responsibility. I don't know, but he certainly persuaded me then.

MR. THOMSON: He did, but I have another shot at it.

THE COMMISSIONER: All right.

MR. THOMSON: You see, let's take that as a starting point. It is only in the report and let me take that for purposes of discussion. There are two other elements that you have to bring



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2 into play, though, and that is, are you prepared
3 to accept as a principle applicable in Phase I,
4 as in Phase II, because I urge that you should.
5 I say that take it now and from this point forward,
6 whatever we did before when we thought the ground rules
7 were different is a different matter, sir.
8 From this point forward surely you should not
9 receive, either evidence or argument not relevant
10 to an issue you can report upon. Secondly, in
11 deciding what is the issue that you can report
12 upon then you have to remember that if you don't
13 have the power to exonerate and you don't have the
14 power to blame, and you can't do either, you can't
15 either exonerate or blame by process of elimination
16 or by inference or by process of reasoning, if that
17 follows, sir, then I put it back to you that the
18 arguments that you will hear is not of use.

19 You see, as I understood the process
20 that you perhaps could follow, is what I thought you
21 were saying to me the other day in your reasons,
22 is that while I may not be able publicly to give
23 the reasoning process through which I go, I may
24 be able to make a finding in a report that is
25 completely silent as to the basis upon which I
arrive, as to the route that I have used, because



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to lead the public down that route points into certain doors which I am not allowed to point directly or indirectly, but perhaps I can make some findings saying that on the basis of what I have heard here that I am satisfied that one child may have died from digoxin poisoning, perhaps another did or others did, I don't know, with the varying degrees of certainty that you might decide in looking at the evidence, but it seems to me to be quite plain from looking at what the Court of Appeal is suggesting to you, and what, as I argue here in fairness, that if you chase down all the areas that were explored in evidence, in cross-examinations and in suggestions, then you are claiming indirection, going to be back into the process in which what we have is a trial of these people who are allegedly implicated.

So in the first place I say this to you: if it is not possible for you to draw a conclusion from the arguments in your report, because so to do is to violate the injunction of the Court of Appeal, then surely it is wrong for you to allow argument on those issues in either public or private.

You see, on the one side, sir, there



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is a clamour from the press and we just heard about the Sun Editorial this morning saying, "Let the public know". All right, that is one side of it. Surely, with respect, the public right to know, as is reflected here, is always subject to your discretion. So far you have been the most generous, in terms of public perception of any Commission that I am familiar with, sir, because in general terms --

THE COMMISSIONER: Generally Commissioners are pretty generous. It just **doesn't** hit them between the eyes they way mine has. They have always been open, but nobody wants to hear.



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MR. THOMSON: We now have again , in terms of public perception, the press wants to hear, yet, what is left, frankly, in terms of Phase II effectively gone, from looking at, from listening to your report this morning, what is left is simply a determination in public terms of the cause of death, which, by indirection, involves a continuing public scrutiny and public argument and the rest of it of my client. I find that offensive and I know you do, too, personally.

I am saying that in terms of examining the process surely it is appropriate now that we put together the various principles. You have a discretion, you have already said to me, or said to us in your report this morning, you should not receive evidence that you can't decide upon. If you can't exonerate and blame, then why allow people to stand up here making accusations at other people, at other parties to the process, because from listening to Mr. Hunt, that is what is going to happen. I am not saying that he said that that is what he is going to do, although from listening to his cross-examination he well might.

Again, I must admit that there is something troublesome about that because



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2 you know who Mr. Hunt represents.

3 I, therefore, simply, to go back
4 at this, say that I would hope that for essentially
5 resolving many of the other procedural issues
6 that arise, the first question, and I know you
7 have resisted my suggestion earlier, because you
8 may recall when Mr. Scott and I argued the earlier
9 position, I then attempted to ask -- I asked you
10 to make up your mind, as to what you proposed to
11 do in the report. You raised the question with Mr.
12 Hunt this morning, indicating that you are puzzled,
13 and I can well understand, why, sir. Mr. Hunt
14 wasn't able to satisfactorily answer the question.
15 I can't tell you that I have adequately answered
16 it either, but until you come to grips with how
17 you are going to address the issue in the report
18 you are really not going to be able to satisfactorily
19 resolve the question that I pose. If the argument
20 isn't going to be useful don't let them make it,
21 particularly, because it is the kind of argument
22 that tramps all over the civil rights of people
23 in this kind of proceeding, which has already been
24 characterized by you and others as coercive .
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22 MR. LAMEK: No, no.

23 MS. CRONK: No.



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THE COMMISSIONER: I am sorry about that. I have never characterized these proceedings as coercive. No one has been required to attend, to give evidence at any point. Argument has never been made and I always reserve the position that I might take if one declined to give evidence.

MR. THOMSON: Let's have it out. As far as I am concerned, and I think the Court of Appeal characterized it, this proceeding -- and I don't want you to think that what I am saying is offensive at you or Mr. Lamek. It is coercive in its nature, sir, because the Public Inquiries Act required my client to be here and if she didn't come she would have been required to be here, sir.

THE COMMISSIONER: I never said that. I never said that at any time to anyone and the issue was never raised. I did not require it. Everyone came voluntarily. There may have been a few subpoenas issued because people asked for them but I never told anyone. It was clear to everyone that the issue had not been decided, and it wouldn't be decided until it was raised.



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2 MR. THOMSON: I think, with respect,
3 it is academic to suggest it is other, because
4 the people who are each involved, Mrs. Trayner,
5 particularly, by the nature of the process, by
6 the mandate you were given as I have said this
7 before, has been put on trial publicly for murder.
8 That is the process.

9 As I say, I am not here to criticize
10 you for that. She has had no choice, but to
11 participate and try to defend herself here. Now what
12 I am asking you to do is to look at the final
13 stages in terms of what you are going to allow
14 people to say in argument and what you are going
15 to say in your report. All I have been urging you
16 to do is, because of the nature of this kind of
17 process, to let us know now what you are going to
18 do in the report, so that we can deal effectively with
19 what people should be allowed to say in argument.

20 THE COMMISSIONER: I am going to
21 ask you at some point to tell me what I can do in
22 the report and that is one judgement which you
23 won't get until you get the report, because I
24 honestly won't know until the last line is written.
25 So I can't -- I made a decision, as to what I would
do in the report and look what happened to me? So



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I am going to make this one very slowly and very
carefully.

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MR. THOMSON: I realize I, of course,
meant what kinds of things you were entitled to
decide. If you don't decide that, that is, what
kinds of questions you are entitled to answer and
how it is going to be very difficult for counsel
to know what kinds of argument to put forward.

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THE COMMISSIONER: What you have to do
is answer the arguments that are put by -- one
way of answering is to say that it is totally
irrelevant. You have been in Court -- I was going
to say since the turn of the century -- it is not
quite as long as that, but you know the way you
deal with argument. Sometimes your opposition
makes speeches and arguments and you dismiss them
as having nothing whatever to do with it. Sometimes
you are a little worried about them and you answer
them and sometimes you are very worried about them
and you have a long harangue on the subject. That
is the way you have to deal with it. If Mr. Hunt
thinks this is relevant, you have to deal with it.

I think what we are really talking
about now is how we do it and whether the interests
are such -- reading the section here:



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"All hearings on an inquiry are open to the public except where the Commission conducting the inquiry is of the opinion that."

Public security is one of them and it is hardly that.

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"(b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public... "

It is not crucial, but it means that I have to decide. Isn't that somewhere along the line, as to what the interests are, whether public interests or the interests of the persons affected are such, but there is no question that the fundamental principle is that they are open to the public, and I have to have very good reason for not making them open to the public. You can revise your argument as



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2 well as to --

3 MR. THOMSON: I just want to adopt
4 what you said at page 4 and the reasons you read
5 this morning. If you do not have the right to
6 exonerate my client of the accusations of murder,
7 which she has been faced with in the course of this
8 hearing, then you should not allow any counsel
9 to stand up there and accuse her. I put it to you
10 that simply, sir. That is wrong. Whether it falls
11 within the meaning of that or not, surely that has
12 got to be right. If you don't have the right to
13 exonerate my client of the accusations of murder
14 then you shouldn't allow counsel to stand up and
15 accuse her directly or indirectly.

16 THE COMMISSIONER: Thank you.

17 MR. SCOTT: Mr. Commissioner, just
18 before we get back to Mr. Hunt, in view of the
19 exhortation --

20 THE COMMISSIONER: It will be a long
21 time before we get back to Mr. Hunt.

22 MR. SCOTT: In view of Mr. Thomson's
23 request, I would like to weigh in with the assertion that
24 whether you want to decide the question that he
25 presents to you or not is beside the point, because
the Court of Appeal has already decided it for you



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2 and the pages of holy writ, to which I referred,
3 are pages 15 in the text and 18 and page 15, the third
4 line from the bottom, canvassing this very question
5 of evidence, argument and report, the Court said:

6 "He (that is you) has no discretion... "
7 I emphasise that, because Mr. Thomson said that you
8 had a discretion.

9 "He has no discretion that would permit
10 him to decline to make a finding of
11 intent or state of mind relative to
12 the cause of death in order to make
13 a finding identifying the person
14 responsible, because in his view of
15 the interests it would be better to
16 do so".

17 You can not, therefore, decline to make a finding of
18 intent or state of mind relevant to the cause of
19 death and that is going to take you --

20 THE COMMISSIONER: I can certainly,
21 I can decline to make such a finding, because it is
22 not available.

23 MR. SCOTT: Yes, of course, but if the
24 evidence warrants and attracts you, you cannot decline
25 to make a finding of state of mind relevant to the
cause of death and that, of course, leads you to the



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2 question of precisely whose mind are we talking
3 about when we are deal with the state of mind.
4 So this matter will have to be argued. It may not
5 be reported on.

6 Then further, as if there were any
7 doubt left, the Court of Appeal dealt with
8 it at page 18 in terms of essentially evidence,
9 argument and report. It says at about the 8th line
10 from the bottom:

11 "The Commissioner is obliged to hear
12 all of the evidence relating to the
13 cause of the death of the children
14 and this would include evidence
15 which tended to show that one or more
16 of them died as a result of unlawful
17 or negligent acts."

18 And that we have done.

19 "While the Commissioner must not
20 identify an individual as being legally
21 responsible for a death, he should..."

22 And that is the report.

23 "...he should analyse and report..."

24 Now, analysis and report, mean, in my respectful
25 submission; hear argument about, analyse yourself
and then report on what?



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"...upon all of the evidence with

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respect to the circumstances of each

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death and if he can, make recommendations

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with respect to that evidence."

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Now, it seems to me interesting, though Mr. Thomson's
submission may be, an attractive though you may

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find it as a generally abstract matter, the Court

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of Appeal has decided the parameters that are

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imposed by you on the Order in Counsel.

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I will have something to say about

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Mr. Hunt's motion.

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THE COMMISSIONER: Yes, all right Mr. Brown.

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--- Short Recess.

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---On resuming

THE COMMISSIONER: Yes, Mr. Brown.

MR. BROWN: Yes, sir. As a matter of general principle, sir, I support the logic of Mr. Thomson's argument and agree that if you cannot report on the identity of the administrator of a drug causing the death of a child, you should not be entitled to hear argument on the same issue .

After the Court of Appeal decision you heard argument on the evidence that you could hear and whether the Court of Appeal decision --

THE COMMISSIONER: Supported the idea?

MR. BROWN: I did support it, sir, but at that time a submission was put to you that you had essentially two functions: that first you had an inquiry function and Mr. Scott put to you very forcefully that the hearing of evidence should be allowed, the fullest hearing of evidence should be allowed in order to allow the public to have a window on the events that transpired at the Hospital. You ruled it in that favour and the evidence has been in and there has been the fullest airing of the evidence.

The second function which was described



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2 was that of a reporting function and the Court of
3 Appeal restricts you, sir, in that function. It
4 would be my submission that the argument put to you
5 is directed more towards that second function that
6 you are restricted than in the first. For that
7 reason the nature of argument on evidence put to you
8 should be tailored to accord with the prescriptions
9 placed by the Court of Appeal. If, however, you
10 decide it is not limited I have some difficulty
11 with the proposition that argument should be held
12 in-camera. To date, all the evidence has been held
13 in public. Any allegations made against Miss Nelles
14 have been put to her in public and she has applied
15 to them in public. I would not want the public to
16 be left with the perception that there are outstanding
17 matters put to her, which are so sensitive that the
18 public could not hear them and there was something
19 else left to explain.

20 I also have difficulty, sir, with
21 hearing the argument in-camera, because if evidence
22 of identity --

23 THE COMMISSIONER: There will be no further
24 evidence submitted. Submissions will be made. Is
25 that what you are concerned about, that there might
be submissions made . respecting her that the



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public might have the impression that submissions
were made respecting her?

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MR. BROWN: That is correct, that
there was something said about Miss Nelles that
wasn't made directly apparent to the public in
evidence.

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THE COMMISSIONER: I wouldn't like
that either, but the problem is what happens with
the submissions. Isn't that what you meant?

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MR. BROWN: I will address that in
a moment, sir. It is something that Mr. Hunt
said in that respect that does concern me.

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THE COMMISSIONER: Yes, all right.

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MR. BROWN: That is one consideration
I have with the in-camera. The second thing,
whether or not to hold it in public or in-camera,
is that it has been argued upon you, sir, by Mr.
Hunt, that the evidence, with respect to identity,
can assist you in characterizing the death, as
being perhaps a death by natural cause or a death
by deliberate action. I assume, sir, that would
assist you where the medical evidence might be
ambiguous or ambivalent and that the presence of
a person or persons might tip the scale in the
presence of that difficult medical evidence, in



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2 allowing you to determine how they died. If that
3 argument is restricted to in-camera what, then,
4 sir, would be the absence of a person? It would
5 be my submission, and certainly we would want
6 to be able to argue, that the absence of Miss Nelles
7 when certain children died suggests that she had no
8 involvement in the deaths of any of the children.

9 If you say that arguments with
10 respect to presence, must be held in-camera , we
11 do not want to be shackled, so that we cannot
12 say her absence indicates that she is innocent
13 of any wrong doing. That is another difficulty
14 that we have.

15 THE COMMISSIONER: Could you say that
16 in-camera if you wanted to?

17 MR. BROWN: We could say that in-
18 camera, but it is something that we want to say
19 in public. It was said in public at the preliminary
20 inquiry and subsequently reported.

21 THE COMMISSIONER: That is the fundamental
22 problem about all of this is that no naming names
23 means no exoneration. What do I do with that?
24 Obviously I can't.

25 MR. BROWN: Obviously in the report,
but you are now entertaining the proposition that one



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2 can inculcate an argument. Surely the converse
3 applies as well. Counsel can exculpate an argument.
4 We cannot be restricted in doing that.

5 THE COMMISSIONER: Are you suggesting
6 that perhaps we could allow people to exculpate
7 an argument, but not inculcate?

8 MR. BROWN: No. If you do one, sir,
9 I submit logic dictates that you must be able to
10 commit the other.

11 THE COMMISSIONER: Thank you.

12 MR. BROWN; With respect to the
13 damage that submissions might have on the reputation,
14 Mr. Hunt, in his submission to you, stated that
15 the submissions may go much farther than any question
16 asked of a witness and that he had some concern
17 with that, because there might be injury or damage
18 to a person's reputation. It is my submission,
19 sir, that the general principles of argument in
20 cross-examination should apply in this inquiry and
21 that if an allegation was not put to a witness
22 in cross-examination, counsel cannot later, in
23 argument, raise that allegation against that
24 particular person.

25 THE COMMISSIONER: Is there any
allegation that was not put to someone in evidence?



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I missed it if there was one.

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MR. BROWN: All I am saying is that if certain counsel intend to make allegations against Miss Nelles that they did not put to her in her cross-examination, I submit that that is fundamentally unfair and shouldn't be allowed.

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Those, sir, are the submissions I have.

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THE COMMISSIONER: All right, thank you.

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Yes, Mr. Young.

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MR. YOUNG: Sir, inspite of the opinion of certain newspaper editors it is our belief that this Commissioner has been a fair and open inquiry, public inquiry.

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We are not aware of any evidence being heard in-camera todate. We stress that, and I believe Mr. Lamek said that earlier, and we cannot stress that enough.

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You have been asked to perform numerous impossible tasks or almost impossible tasks throughout the course of these proceedings or tasks that certainly have been described as that. We, sir, are not asking you, at this time, to perform a task that we would consider impossible,



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2 that is, to report in a public report upon argument
3 that we would hear in-camera.

4 I would say to you, sir, that any argument
5 we will be making, will be based upon evidence
6 that you have ruled relevant and it is our position
7 that if your report is going to be public and,
8 of course, it must be, the argument must be public.

9 THE COMMISSIONER: Thank you. Mr. Scott?
10 Mr. Roland?

11 MR. ROLAND: Sir, the Hospital's
12 position is that this is a public hearing and it
13 has been public throughout and it should continue
14 to be but the argument is one that should carry
15 on in all aspects in public and that it would be
16 a shame if the public was denied the opportunity
17 of hearing the conclusions that all counsel seek
18 to draw from the evidence that they have heard in
19 this public forum.

20 Mr. Thomson has indicated this has
21 been, in many aspects, through the way in which
22 witnesses have been examined, the trial of his clients,
23 and that the allegations have been made through the
24 questioning, that the manner of questioning, that his
25 client has had allegations made against him tantamount
to murder -- actually used the word, 'Murder', this morning
and it is no secret in the



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public and in this hearing room that those
allegations, in a sense, have been made through the
questioning and so on. It is not going to be
surprising to anybody if one party or another
makes the same suggestion or allegations in terms
of summing up the evidence and putting the propositions
to you, and as Mr. Scott indicated this morning,
you have an obligation to decide whether or not
some or other of these babies were intentionally
administered an overdose of digoxin. That is something,
that seems to me, being your mandate, have a right
to hear from the various parties their conclusions
to be drawn from the evidence.



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It would be, I think, a shame if the public was denied that opportunity and it would be a shame if the public had a difficulty understanding your report, as restricted as it may have to be, by the decision of the Court of Appeal because they have not heard the arguments. So in summary, as far as the Hospital --

THE COMMISSIONER: No one except Counsel will put together any arguments and the report, assuming any gaps. I can't imagine anyone doing that. I can't even imagine the press doing that. They might, or some very learned ladies and gentlemen of the press, who might be able to do it but the casual reporter certainly couldn't. The one who just picks up the report couldn't do it and wouldn't be able to do it.

My problem is this: basically what I am concerned about is the fact that it is the headlines that will come out that Mr. so and so alleges that so and so committed all of these murders.

MR. ROLAND: There are people here who will argue the converse, that is, they will



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deal with those arguments, that they are representing the various interests, and will deal and confront and the process permits them to confront those arguments, to deny them and rebut them and to point you to the evidence that goes in another direction. All of that can be fully canvassed before you. In a sense the problem -- Mr. Hunt raises the problem for the client, but, with great respect, it isn't a problem for you, as a Commissioner here, hearing the argument.

THE COMMISSIONER: If you promise to open all my mail and collect the newspapers before I get up in the morning so that I won't have a chance, and clear out all the television sets and all the radio sets and roundabouts so that I will be shielded from all of this, then I will be happy to go along with --

MR. ROLAND: I would have thought by now you would have grown a little immune --

THE COMMISSIONER: A little, but not quite totally yet, however, thank you very much.

Miss Chown, where is your vote?

MS. CHOWN: I am voting along with



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2 Mr. Roland and I will simply comment on some of
3 his latter comments and your responses.

4 You said that you think it is
5 unlikely that the members of the public and the
6 members of the press will be doing a matching
7 game, as to where argument is done by Counsel, and this
8 does often not end up in your report. You said
9 that you are concerned about large headlines that are
10 reported on the basis of the argument. We have, throughout
11 this process, said it is important if your report
12 is going to have the effect that you and others here would
13 wish it to have that the public perceives this
14 system as being a fair and open one. We have been in-camera
15 before and if you go in-camera I think the inference will
16 be in the public mind that you have heard submissions
17 that in some way influenced your report on a day when the
18 public were not able to assess those submissions,
19 themselves. I think that that kind of inference,
20 whether true, in fact, or not would cast a cloud
21 on your report that would be unfortunate.

22 I would support that the argument
23 be made in public.

24 THE COMMISSIONER: Yes, all right.

25 Thank you.



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Miss Kately?

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MS. KATELY: Could we change the order on this, sir, and could I be allowed to go after the parents?

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THE COMMISSIONER: I don't know how the parents feel about that.

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MR. TOBIAS: I have been quite used to Miss Kately preceding me. I would be heartbroken, sir, if you altered that pattern.

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MS. KATELY: The only reason I ask, sir, is because I have the position that it would assist me if I would hear from parents before I took it. I don't know whether there is any cohesiveness there or not.

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THE COMMISSIONER: I think Miss Kately is really speaking to you, not to me. What is your position?

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MR. SHANAHAN: I don't mind from my part, Mr. Commissioner. If something develops there that I want to respond to because of the way arguments weave together in some way, that we are supporting the position that we are not really supporting, I obviously would want to respond.



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THE COMMISSIONER: You are quite happy to go ahead of Miss Kitley?

MR. SHANAHAN: I am quite happy.

THE COMMISSIONER: All right. Are any other parents happy to go ahead?

MR. LABOW: I am quite prepared to go.

MR. SHINEHOFT: I, as well.

MR. TOBIAS: I certainly don't want to be characterized as the black sheep. I will go along with my friends.

THE COMMISSIONER: All right, then, Mr. Labow, let's hear from you then.

MR. LABOW: Mr. Commissioner, I support all of my friends who would like this argument, any argument, to be held in public for all of the reasons they have stated and I think we would be doing a great disservice to our clients, in particular, if any argument was heard in-camera, because it would put us into a very strange position at best. How could we report to them that we have done as full a job as we could if we had to present some of our argument to you without them being able to hear it? It is



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2 this argument, and I think all argument here,
3 and especially the parents' Counsels' argument,
4 will be intertwined with the global situation
5 presented by all the matters that have come
6 you and I would find it near impossible to separate
7 my argument out, to take out the pieces relating
8 to identity for each of the six children that I am
9 going to be referring to and argue that in one
10 place and then argue at another time and in another
11 place the rest of the argument, because it would
12 not flow and you would not be able to get what
13 I perceive to be the flavour of everything that
14 has gone on that can characterize many of the
15 situations that I would be referring to.

16 In addition, Mr. Commissioner, I
17 have some difficulty with Mr. Thomson's position.
18 It's always been my understanding that when a
19 stated case is launched any evidence that
20 directly affects the case, itself, can be objective
21 at that time. In other words, when this stated
22 case was launched in the fall, any evidence going
23 to identity, I submit, could have been objected
24 to then, and it is my understanding that you would
25 not have been allowed to hear any of that evidence



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2 if an objection had been launched until the
3 case was determined. Then we went to the Court
4 of Appeal and received their decision.

5 The concern of everyone here
6 especially yourself, Mr. Commissioner, was that
7 we not hear evidence that was totally irrelevant
8 and lengthy argument was presented to you, and it
9 is my impression that you were convinced that
10 this argument, that these pieces of evidence
11 had some relevance and if they were relevant,
12 and they were not objected to, too strongly, and
13 the evidence was allowed in, then I submit that
14 we should be allowed to publicly argue it in
15 front of you.

16 There doesn't seem to me to be
17 any reason now to draw a line that we not drawn,
18 as early as the fall, and once we have heard that
19 evidence and it was proper before you then, I
20 submit it is proper before you now, notwithstanding
21 the fact that our clients do not want to unduly
22 prejudice anybody here.

23 I strongly support the idea that
24 any and all evidence we have heard, and any
25 arguments put before you, be heard in public.



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THE COMMISSIONER: Thank you.

Mr. Tobias?

MR. TOBIAS: Thank you, Mr. Commissioner.

I adopt in full, really, what my friend, Mr. Labow, has said. I have this particular difficulty with Mr. Thomson's position. Surely any argument going to the question of identity -- let's be clear what kind of general kinds of evidence that might be: the pattern, the presence of individuals, things seen being done by individuals at certain times and certain locations. All of that surely, taken on a global sense, must help you in characterizing the pattern on what happened globally to any number of the babies, perhaps all of them, perhaps somewhat less than all of them. That is surely the way you characterize the pattern, has to affect very strongly, in my submission, the conclusion that you might come to with respect to what happened with anyone or more of them.

THE COMMISSIONER: That is an argument. The real problem is whether that argument can be put. Let's assume that that argument can be put. The problem Mr. Hunt is raising is where should it be put, here or next door?



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MR. TOBIAS: The submission I am making in the first instance --

THE COMMISSIONER: What is it they used? The bedroom television set. Turn it off.

MR. TOBIAS: The submission I make in the first instance goes to Mr. Thomson's position, that the argument shouldn't be put at all. That I can't disagree with more strongly. It seems to me that one of the very relevant circumstances, particularly with respect to the Hines child, is that it wasn't one isolated death, but it was part of a group of deaths, all of which, in sum issue and total, may be very well be characterized as suspicious. So that clearly the evidence going to identity has to be commented upon in argument.

The next question is where do we do that? I adopt the submissions of my friends who have argued quite strongly this morning that those arguments must be made in public, in a public forum. It is somewhat ironic that we have this argument on the very morning that Mr. Lamek was forced to comment upon the editorial carried



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2 in the Sun. In that editorial, they made
3 reference to proceedings in a Star Chamber. My
4 great concern is that at this late stage, after
5 we have been having what I perceive to be a
6 very fair and very public process for almost one
7 year that to go in camera will cause all sorts
8 of irrelevant speculation in the public mind,
9 as to what is going on in camera and it will
10 be very much akin to a Star Chamber proceedings.
11 As well, there is the practical problem of
12 what happens when we get to comments that may
13 be made by Counsel in reply as to certain things
14 that have been said in camera.

15 My friend, Mr. Hunt, says, well,
16 that is difficult, but not impossible, we will
17 deal with that as it arises. I have this horror
18 vision of the whole thing turning into a circus
19 where we are running in and out of camera three
20 or four times a day. I just don't think it is
21 practical.

22 THE COMMISSIONER: We wouldn't
23 do that. I would have to draw the line somewhere,
24 as to what you can say where and we would presumably
25 do the public part first and the in camera part



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2 afterwards. I don't think it would be impossible.
3 It would be difficult, but that isn't strange.
4 It isn't new to us around here.

5 I think it is the principle that
6 we have to decide on. I don't really think it
7 would be impossible to do it. It would be no
8 more impossible than it would be to write the
9 report on the basis --

10 MR. TOBIAS: No, I certainly would
11 expect your observations would be no more difficult
12 than reporting after you have heard the evidence
13 probably, and I agree, but if we are concerned
14 about the principle, clearly what we are involved
15 with again is a balancing act. That is the public
16 right to know that we went into all the proceedings,
17 including the arguments, as against any possible
18 prejudice.

19 One thing I do have a great deal
20 of difficulty with which Mr. Roland touched upon,
21 and I adopt his submission, is surely at this stage
22 anyone who has been following these proceedings
23 and following the evidence and has heard the
24 various positions taken by Mr. Hunt and Mr. Percival,
25 and by other Counsel, surely it is going to come



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2 as no surprise to the members of the public
3 what the views of those Counsel are and what
4 submissions they intend to make to you on
5 the evidence or what theories they have
6 about how these children came to their death.
7 I can't perceive that virtually anything that
8 might be said to you in argument would come as
9 a shock or as a surprise to the public, nor would
10 it, in any way, be more prejudicial than what
11 we have already had passed before us, and that
12 is 11 months of public questioning. It is relevant
13 that in those 11 months no subpoenas had to be
14 issued, that all of the players came here and
15 testified voluntarily, knowing what the ground
16 rules were, knowing the kinds of questions they
17 were going to face, and it just seems to me to
18 be totally contrary to what you set out to do
19 11 months ago to, at this point, allow portions
20 of the argument to be in camera.

21 Thank you, sir.

22 THE COMMISSIONER: Thank you.

23 Mr. Shanahan.

24 MR. SHANAHAN: Yes, sir. I think
25 that the argument, sir, should be in public. The



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2 reasons I say that are as follows: first of all,
3 sir, as difficult as the subject matter of this
4 commission has been, and that is the allegation
5 of a serious rise in the number of deaths and
6 the suggestion that some of these children, or
7 many of these children may have been murdered, as
8 difficult as it has been, never in the course of
9 this commission have we ever received any
10 submissions or any evidence in private, any
11 evidence in private, in any event.

12 I think, sir, with respect, the
13 public is sophisticated enough to be able to
14 differentiate here what will come in the next
15 few days and weeks will be argument, sir, argument of
16 Counsel who are acting on behalf of interested parties
17 and we are furthering the interest of those
18 parties. In fact, they will be sophisticated
19 enough, sir, to realize nothing that Counsel will
20 say is, in fact, evidence. I think they will
21 take a jaundiced eye, as they go through the days
22 and hear the Attorney-General, the police and the
23 parents, that they will realize the comments that
24 are made on Monday may well be rebutted, if you
25 like, or refuted or undermined by further argument



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2 on a Tuesday by a Counsel who acts in an
3 opposing interest.

4 I am mindful of the fact that
5 reputations may be damaged by argument, but, sir,
6 it is a physical area, as the role of the media
7 expands, not only to report, but also to comment,
8 and as we have a commission that must have a
9 subject matter that really you have never seen
10 the like of before, deaths bordering on a
11 murder situation. Bear in mind, sir, that even
12 the most basic presumption, that of a person in
13 our society being presumed innocent until proven
14 guilty, even that, sir, we can't guarantee. It
15 is something that once a police officer charges
16 an individual in the general sphere, people do
17 make assumptions and presumptions and that, of
18 itself, only operates to shift the evidentiary
19 burden at a trial.

20 We can do nothing in terms of
21 hamstringing the media so that that presumption
22 won't be eroded.

23 Finally, with respect to Mr. Tobias'
24 point about the question of identity and in the
25 series of deaths, those children or those families



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2 for whom I act, sir, that really is going to
3 be a crucial area.

4 As I address myself to the issues
5 of the Lombardo child, as high toxicology readings
6 or what I perceive to be, and when I look at
7 the absence and presence of certain individuals,
8 certainly, sir, in terms of convincing you that
9 it is part of a pattern and circumstances that
10 were there, I will obviously be alluding to the
11 issue of person or persons that were present and
12 asking you to fit that child into a larger pattern,
13 as one other piece of evidence leading to the
14 conclusion that that child did not die of natural
15 causes.

16 Once again, with the child Dawson,
17 who perhaps doesn't have the toxicology from a
18 clinical point of view again, sir, one of the things
19 I will be referring you to will be the presence
20 or absence of certain named individuals. It will
21 be an important factor.

22 As you accepted, Mr. Thomson referred
23 you to a sentence on page 4. The very next one,
24 sir, really is the basis for you receiving the
25 evidence and I'm going to submit to you the basis



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for you receiving the argument.

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2 You said:

3 "In Phase I, we received evidence
4 relating to identity both before and
5 after the decision of the Court of
6 Appeal. The justification for
7 receiving it afterwards was that it
8 related to the cause of death, an issue
9 which was clearly left for me
10 to determine".

11 I am suggesting to you, sir, that here in argument
12 this evidence, and argument as well, that and
13 only that will be the reason that I will be referring to
14 the issue and I think it must be allowed.

15 THE COMMISSIONER: Mr. Shinehoft.

16 MR. SHINEHOFT: Mr. Commissioner, while
17 I do have a certain amount of sympathy for Mr.
18 Hunt's position I think that as a practical matter
19 it is somewhat unworkable. I agree with Mr. Tobias.

20 THE COMMISSIONER: Leave it to me
21 to try to work it. I want the principle.

22 MR. SHINEHOFT: I say that you have
23 to look at the pragmatic effect of agreeing to
24 have argument in a certain way and I would suggest
25 that we would be running in and out of here like
rabbits putting on hats, one in camera and one not



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in camera. I would submit that the practical application of having such --

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THE COMMISSIONER: Surely I can just stop everything; just say, "Stop. No more." You will save that for next door when we come to that. Can't that work, wouldn't that work?

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MR. SHINEHOFT: It wouldn't, Mr. Commissioner, in my submission, because I maybe saying one sentence and then say, pardon me, I have to go next door to finish that sentence.

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THE COMMISSIONER: No, no. You would just leave that sentence out for a moment.

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MR. SHINEHOFT: This whole Commission has been concerned about where you draw the line, do you not agree?

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THE COMMISSIONER: Yes. I certainly would.

MR. SHINEHOFT: You have another problem that you are going to add to the existing problems of where you draw the line. Suppose you get close to the line, do you say, just a second, we have got to discuss the problem as to how close we are to the line, because we may be going next door? Or do we just continue until we cross the line and say, now, wait a second, you have gone too far, you can't argue this, you have got to go next door?



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I think it is just compounding the problems that exist.

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I again, have a certain amount of sympathy for Mr. Hunt's position.

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The other thing, I guess it goes without saying, I assume almost everyone will agree with me, that I would rather argue this question in camera than to not argue it at all.

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In other words, if you are contemplating saying no that you can't argue this and I think you said to Mr. Thomson earlier that is one of the fundamental rights that counsel do have, the right to at least address you and to present their submissions and their views and feelings, as to what went on and how and by what means these children came to their deaths, then I would suggest that we are entitled to do this, but if we are not and you are going to take the position that you would prohibit counsel from making argument in these areas then I would prefer to do it in camera than not at all.

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(N.B. page 3757 follows)

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2 MS. KITELY: Thank you for your
3 indulgence.

4 It would appear, sir, that there is
5 really one argument and two parts of one argument in
6 favour of an in camera hearing. Mr. Thomson's posi-
7 tion that his client will be prejudiced if it's done
8 in public and the related issue to that is that none
9 of us can trust the - I'm getting some shaking heads;
10 I don't know whether Mr. Thomson is indicating I
11 have I mistated his position. I understood his
12 position to be he didn't want it to be in public, if
13 it was done.

14 The related issue to that is that, if,
15 as you have expressed, there is some reason to not have
16 confidence in accurate reporting.

17 Those two I see as being --

18 THE COMMISSIONER: I hope I didn't
19 say that.

20 MS. KITELY: I understood you to
21 say the headlines, sir.

22 THE COMMISSIONER: Well, no. It's
23 the conception. What I'm worried about is the public
24 conception of what is happening.

25 MS. KITELY: Which, I gather, you were
referring to by saying, well, I'm concerned about the
headlines, and you asked whether you could be



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insulated from them.

THE COMMISSIONER: Well, the headlines could be perfectly accurate and I would still be concerned about the effect of them. I am not suggesting - I'm in enough trouble apparently -- well, no, I'm not; it's only my staff so far that are in trouble with the press. But it's -- well, you know what the problem is. In fact, you've been the greatest exponent of that problem, it seems to me, since we started.

MS. KITELY: I don't know whether I'd say "exponent".

THE COMMISSIONER: No, exponent not of a solution; I meant of the problem!

Anyway, all right. Go ahead. I'm still waiting to hear which side you're coming down on.

MS. KITELY: Well, the problem is, sir, I'm not coming down on either side. I would have liked on this issue to --

THE COMMISSIONER: Do you think I can do that, too?!

I adopt the argument of Miss Kitley in its entirety.

MS. KITELY: That would be delightful, sir. We might agree on something!



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2 I would like to be able to come to a
3 conclusion, sir. Unfortunately, because of the various
4 positions that have been asserted by all the parties,
5 this is one issue where we would be unable to.

6 Might I say, sir, though, the diffi-
7 culty that I have on behalf of our clients is that we
8 have always supported a public and open enquiry and
9 if I can remind you again, the evidence of one of our
10 clients has been described as being probably the most
11 important evidence heard at this Inquiry and, to the
12 extent that any of her evidence - I'm referring to
13 Bertha Bell, sir - to the extent that any of her
14 evidence is used or applied by my friends, it is in
15 our interest that it be done in public.

16 On the other hand, I can appreciate
17 the arguments for not holding it in public and,
18 consequently, I am not in a position to take a position.

19 Thank you, sir.

20 THE COMMISSIONER: All right. Thank
21 you.

22 MR. BROWN: I know I don't have a right
23 of reply but I thought of something a bit late and
24 perhaps I can interject now.

25 You ruled this morning, sir, that you
weren't going to proceed with Phase II until the



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difficult matter was resolved.

Some time ago, we collapsed Phase I and Phase II and, for four or five witnesses, heard evidence relating to both phases.

I would submit, sir, that evidence which they gave, which was admitted in order to assist you on Phase II, should not be referred to in the argument on Phase I.

THE COMMISSIONER: I agree. I agree. I don't think there can be any question about that.

Mr. Lamek.

MR. LAMEK: Mr. Commissioner, can I first - not because I think you are in any doubt as to what this is about; because there may perhaps be some confusion in other quarters - address one thing.

As I understand it, the question is not whether the argument as to the identification of a perpetrator should be in public or in private; the only argument that can be addressed before you in light of the Court of Appeal decision is as to the cause of death. As I perceive it, nobody is going to be contending that X or Y is a perpetrator for the sake of establishing the identity of a perpetrator. It is, rather, that some of the evidence that may be relevant to cause of death may reflect on individuals.



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THE COMMISSIONER: Yes. That's so.

MR. LAMEK: And it is whether such references should be made publicly or privately that this question arises.

In that regard, my friend, Mr. Brown, referred to evidence going to the absence of his client at certain deaths and said that he and Mr. Sopinka would want to argue that that evidence indicated that she had nothing to do, not only with those deaths but with any deaths.

In my respectful submission, that misconceives the point. The evidence is not going to be argued about to show whether X or Y did or did not have anything to do with deaths, not to show who did it or didn't do it but, rather, might only be used as tending to show that something was or was not done.

Now that, at some point, may become rather metaphysical. I think it's rather important, Mr. Commissioner, to clarify precisely what it is we're concerned with.

THE COMMISSIONER: Would you say that again so I will understand it.

MR. LAMEK: Yes.

It may be that evidence may tend to show that X or Y did something. It will not be the



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2 purpose of argument; it is not a matter upon which
3 you can make a finding, sir, that X or Y did do
4 something. The only relevance of that evidence may be
5 that something was done.

6 THE COMMISSIONER: That's right. All
7 right, I will accept that.

8 MR. LAMEK: The suggestion from Mr.
9 Hunt, supported by Mr. Thomson, is that those submis-
10 sions should properly be raised, if at all, in camera
11 because of the prejudice that may accrue to the per-
12 sons who are thus involved if their involvement is
13 discussed publicly by counsel.

14 I have to say, sir, I am not un-
15 sympathetic to that argument and I take no strong
16 position either for or against it. I am obliged to
17 say that my sympathies tend to lie with those who
18 oppose Mr. Hunt's suggestion, but not violently so.
19 And perhaps all I can do, sir, in the hope to be of
20 assistance to you, is raise a couple of considerations
21 which I respectfully suggest you should have in mind
22 when you come to a decision on the matter.

23 First, as has been said before, the
24 evidence here has all been heard in public and, to
25 retire from the public view when the stage arises for
counsel to make submissions as to what all that public



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2 evidence may mean, may be considered odd; it may,
3 frankly, be even considered a little "cute".

4 Second, as I said earlier today, there
5 has been a commitment from the beginning of the pro-
6 ceedings of this Commission that, to the greatest
7 extent possible, we would do whatever we do publicly.
8 And, in light of the Attorney General's observations
9 when he announced your appointment a little over a
10 year ago, sir, observations as to the vital importance
11 of having a full public airing of these matters, the
12 commitment to proceeding publicly was, in my sub-
13 mission, a sound one. It's still sound, and I suggest
14 that those who now contend that portions of the argu-
15 ment be held behind closed doors have the onus of
16 showing that the commitment to public proceedings
17 should be suspended.

18 In my submission, the suspensions
19 should not lightly be granted.

20 Third, if, in your report, sir, you
21 feel entitled and able to refer to all evidence bear-
22 ing the cause of death, even though some of that
23 evidence may also bear on the identity of a perpe-
24 trator, you may want to - and I suggest you certainly
25 should be free to - refer to the arguments that have
been advanced by counsel.



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2 I have even seen judgments by the
3 Court of Appeal where there have been references to
4 the arguments of counsel. Sometimes, they've even
5 stated them correctly.

6 I suggest those things should be
7 borne in mind when approaching the question.

8 If I may^{say}/something about the logistics
9 because I confess I have sympathy with my friend,
10 Mr. Shinehoft, on this - the practicality of achiev-
11 ing the result should not, and I suggest cannot,
12 totally be ignored, and I stress there are a couple
13 of problems.

14 The first goes to Mr. Labow's point,
15 I think, that, in a sense, it is less than ideal in
16 arguing the matter to deal with the identity-related
17 submissions as a separate block, whether it be done
18 at the outset or at the end. Argument, as I under-
19 stand it and as I know you do, usually weaves strands
20 in and out of the fabric of the whole affair in an
21 attempt to make an effective synthesis of all of the
22 evidence - in other words, I guess I'm saying one
23 hopes to create a picture; not a patchwork quilt - and
24 to hive off a block of evidence and attempt to deal
25 with it as a separate matter will make it the more
difficult to present an effective synthesis of all



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2 of this evidence that may be of assistance to you.

3 There's another logistical problem
4 because that, I suppose, goes to the effectiveness of
5 argument; not the ability to make it, and that is the
6 question - are we to have one mammoth in camera
7 session either at the beginning or the end when each
8 counsel, in turn, will say his piece on the non-
9 public matters? That could be done, but I suggest it
10 would be seriously disruptive of the total submission
11 of each counsel. There will have to be a relation
12 back between what he says in his turn in the in
13 camera session with what he has said perhaps days or
14 weeks before in the public session.

15 The alternative is to move in and out
16 of in camera sessions - not ad hoc during the course
17 of argument. But as each counsel prepares argument,
18 he must say to himself, all right, this I can say in
19 public; that I need to say in private. One way of
20 dealing with it would be, as each counsel presents
21 argument, for each counsel to have a public session and
22 an in camera session, then move on to next counsel;
23 same thing with him. That would be less disruptive
24 of the argument of each individual counsel. It will,
25 however, be disruptive of the proceedings.

 All I say, sir, is that there's a



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2 logistical price to pay for acceding to the suggestion
3 of Mr. Hunt.

4 Clearly, my sympathies lie with those
5 who oppose it. I do say, sir, I don't oppose it
6 strenuously. All I say, sir, it does, obviously,
7 deserve very careful consideration and, in my
8 respectful submission, should not be acceded to
lightly.

9 I don't think I can be of any further
10 help.

11 THE COMMISSIONER: Now, Mr. Hunt.

12 I am not cutting you off, if you want
13 to reply as well.

14 MR. THOMSON: I would like to reply
for about two minutes.

15 THE COMMISSIONER: I think we will hear
16 from you first, Mr. Thomson.

17 MR. THOMSON: I would like to say two
18 things.

19 First, I am still puzzling over Mr.
20 Lamek's submission that the argument ought to be
21 limited to submissions as to what was done and
22 was not done. I noted that and I understand, I think,
23 what he means. I have great difficulty, though,
24 perceiving that that is the way the argument is going
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2 to be put and framed. Certainly, the questions put
3 to my client were not along that line; they were
4 far less - I think my friend used "metaphysical", far
5 more blunt. In other words, as always, we have to
6 look at the legal analysis on the one side and the
7 practical reality on the other.

8 One of my friends made reference to the
9 "star chamber" process and said that we were risking
10 encountering a star chamber process. I say that
11 what was wrong with the star chamber, fundamentally,
12 as we now see from the 20th century, was that people
13 were brought there and compelled to answer, sometimes
14 under process of torture, allegedly, but, in any event,
15 something was in secret that resulted in people being
16 imprisoned, and we've groaned about that and said we
17 can't do that again.

18 But, you see, in my process, in my
19 perception, what none of my friends have really dealt
20 with is the argument that essentially I have made - if
21 you cannot exonerate and you cannot blame, then what
22 possible justification is there to permit people, in
23 metaphysical terms or not, to counsel, who are officers
24 of the court, respected citizens, standing up accusing
25 people of the crime of murder, which is what it amounts
to.

I appreciate what Mr. Lamek says - if



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2 everybody wants to argue neatly, nicely, perhaps there
3 isn't difficulty, but I don't expect that to be the
4 real reality, and I go back to what I said to you
5 before - I detect that you are not inclined to follow
6 my submission but I will reiterate it once more. I
7 urge you to decide initially how you propose to handle
8 this very difficult effort that was described as a
9 task almost impossible in your report. Mr. Scott
10 read passages from the Court of Appeal judgment which
11 satisfies his submission that there's really no
12 problem here; just keep it moving down the track, which
13 is what we agreed to before, and I say, well, at
14 some stage, you've got to look at it and say the
15 Court of Appeal recognized a pretty serious problem
16 when they characterized your job as "almost impossible".
17 What were they saying to you, sir?

18 I suggest what they were saying is
19 exactly the point that I'm on now - if you're going
20 to run through here, making findings with respect to
21 arguments relating to the question of identity, you
22 are going to be going on the side of the line the
23 Court of Appeal characterized as the one which you
24 don't belong on. For Mr. Scott to say, oh, well, in
25 the earlier passages of the judgment, they said hear
the evidence, hear the argument - and I agree they
did - they throw in the final safeguard, which says,



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2 in times of difficulty, lean on that side. And I,
3 frankly, don't know how you can rule on the motion
4 here without coming to some decision as to what use
5 you are ultimately going to make of arguments of this
6 nature.

7 Thank you, sir.

8 THE COMMISSIONER: Thank you, Mr.
9 Thomson.

10 Mr. Hunt.

11 MR. HUNT: Sir, I detected in the
12 submissions of my friend, Mr. Roland, that he felt
13 this was really a problem solely related to my clients
14 and not something that the others really have to be
15 concerned with.

16 With great respect to him, he has
17 missed the point.

18 This is a matter of balancing the
19 public interest against the private interest, and that
20 private interest is one of prejudice and damage to
21 reputation that we've all been confronted with, both
22 inside and outside the hearing room, for some number
23 of months now.

24 The critical distinction in what has
25 happened so far is that, contrary to what my friend,
Mr. Thomson, has said, no one, no lawyer, alleged



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2 to any witness here that they were a murderer or that
3 they killed children and --

4 MR. THOMSON: You could have fooled
5 me.

6 MR. HUNT: Well, that's the distinction
7 that we're now faced with in terms of the submissions.

8 It may be that no one will make that
9 submission to you in those bald terms, but Mr.
10 Shanahan has come forward and given you an indication
11 of what he is going to submit to you; he is going to
12 refer to the presence or absence of certain indi-
13 viduals with respect to certain deaths that he's going
14 to argue. I take it his submissions go to the
15 question of whether that death was foul play or whether
16 it was natural causes.

17 You, in my submission, hit the nail
18 on the head, that the question we all have to confront
19 is that that's going to be reported and it's going to
20 be reported because a lawyer said it to you, and it's
21 going to carry, in my submission, much more impact
22 than even the oblique lines of questioning that were
23 put to witnesses when it's now all brought together
24 and whatever package it's put in, it's going to be, in
25 my submission potentially very damaging to the people
who are named.



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2 So, it's simplistic to suggest that
3 this is a problem related to any particular client
4 here.

5 I put this to you as a matter of real
6 concern going to the credibility of the Commission,
7 the public perception of what is happening here and,
8 really, it is based in a submission of fairness, and
9 that's the basic submission, really, that the Court of
Appeal grappled with in their judgment.

10 They said that you couldn't do certain
11 things because, if you did them directly or were even
12 seen to do them, that was going to be unfair to
13 someone, and they were so concerned about that, that
14 they, as we all know, said you can't do what you
had thought you could do; naming the names.

15 I submit to you that the issue here
16 is one that really comes down to a balancing of
17 interests that you have to do, and you have to be
18 keenly aware of not just what the Court of Appeal
19 said but the experience that we've all had over the
20 last four months and what we've learned of the way
21 in which the public perceives what is happening here
22 and characterizes it and comments on it and that, as
23 has been said to you before, is going to have a lot
24 to do with the way in which the whole exercise is
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2 perceived at the end of the day.

3 That, I submit to you, is really what
4 is at the bottom of all of this.

5 Now, Mr. Lamek says to you that you
6 should be free, in your report, to refer to the
7 arguments of counsel, and I don't dispute that. I say,
8 what better person to have to decide whether you are
9 going to disclose any of the submissions that were
10 made to you in camera in your report than you?

11 Surely, that is a much more satis-
12 factory situation, to have you, Mr. Commissioner, in
13 control of that type of matter, material, than to have
14 the situation that we may face when you're con-
15 fronted with fifteen, twenty counsel arguing positions
16 to you and you have no control over what is said to you
17 during the course of argument, or I should say, very
18 little control, in an open argument, as to what is
19 going to be said to you, and the lesson we've learned
20 is that that's news. That's the news that goes out -
21 and I don't criticize our friends in the media because
22 that's the fact of it; it is news. But it's based on
23 that information that's disseminated to the public that
24 way that the perceptions of what we're doing is based
25 on and the final judgment of the public on what we've
done is going to be made.

So, I say that that problem that Mr.



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2 Lamek was raising is not a problem, and I welcome that
3 being left to you to decide when you're writing your
4 report - what should and should not be referred to.

5 As for the problems referred to by a
6 number of my friends moving in and out of the hearing,
7 the public hearing, into in camera sessions, that's
8 mechanical; that's something we can have another
9 argument if we have to, to determine the best way to
10 do that. It really is not an integral factor in the
11 real question that we have to grapple with here.

12 My final point deals with Mr.
13 Thomson's first point, which is that there should be
14 no argument on these issues at all.

15 I won't say any more on that than
16 this: The reason that the evidence was received is
17 apparent to all of us - it may assist you in character-
18 izing a number of deaths. That being the case, then
19 people are obliged to make submissions to you on that
20 and you are obliged to consider them. You may find
21 them of no value at all but that, again, takes us
22 beyond the point that I am concerned with now, and that
23 is what submissions will be made and how they're going
24 to be perceived by the public when they're made and
25 what effect that is going to have on the perception of
26 the Commission in the final report.



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2 Weighing all those, I say you have
3 the chance now to take a step that will really, I
4 submit, prejudice no one - it may make our task more
5 difficult, the lawyers, but that's part of the
6 territory and no one should be overly concerned about
7 that - and you have the opportunity to prevent what
8 may be a great injustice, greater injustice than any
9 that may have already occurred to a number of
10 individuals. That's something you ought to take.

11 THE COMMISSIONER: Fine. Thank you,
12 Mr. Hunt.

13 Now, I am certainly not going to
14 decide it now. If anything, I think this is the
15 most difficult problem that has arisen yet.

16 All I can say to you is I will give
17 it to you - it may not even -- it may just come out
18 as a reserve judgment, I don't know. I will get it
19 to you as soon as I can. Don't let that be an excuse
20 for not preparing for argument. You may have to do
21 some editing but I don't want anybody to say that
22 this took you by surprise. I want you to consider
23 the possibility that it will go either way.

24 MR. TOBIAS: Mr. Commissioner, if I
25 may just ask one question.

 Is it your intention, commencing June
4th, to sit Fridays, or will you only be sitting four



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days a week?

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THE COMMISSIONER: Well, I think it's
the general view I shouldn't sit on Friday.

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MR. TOBIAS: It's obvious that was
the general view - I'm afraid to walk out of the
hearing!

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THE COMMISSIONER: Tell you what, I'll
hear Mr. Tobias' argument on Friday!

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All right then, until -- possibly
you'll be called back; otherwise, not until ten o'clock
on the 4th of June.

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--- whereupon the hearing was adjourned at 12:45 p.m.
until Monday, the 4th day of June 1984, at ten
o'clock in the forenoon.

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